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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF LOS ANGELES and
DEPARTMENT OF WATER AND POWER,
Cross-Petitioners,

v.

PREFERRED COMMUNICATIONS, INC.,
Cross-Respondent.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff with no financial or technical ability to construct a multi-million dollar cable system has standing to challenge a municipality's cable franchising process solely because the plaintiff has a stated "desire" and "willingness" to construct such a system.

2. Whether the First Amendment compels a municipality to cede ongoing, non-transient use of its streets and rights-of-way to more than one cable operator simply because there is space to accommodate an additional system, notwithstanding the municipality's interests in minimizing the safety risks, disruption, and visual blight caused by an additional system, and in conserving the space for other uses.

3. Whether the constitutionality of municipal restrictions on the grant of cable television franchises should be reviewed under the " 'forum-based' approach for assessing restrictions that the government seeks to place on the use of its property," *International Society for Krishna Consciousness v. Lee*, —— U.S. ——, 112 S. Ct. 2701, 2705 (1992).

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioners, the City of Los Angeles and its Department of Water and Power, respectfully request that, if the Court grants the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by Preferred Communications, Inc., in No. 93-1570, then the Court should also issue a writ of certiorari to review the judgment of the court of appeals on the questions presented in this Conditional Cross-Petition.

OPINIONS BELOW

Cross-Petitioners incorporate by reference the "Opinions Below" section in the Petition for Writ of Certiorari in No. 93-1570.[1]

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[1] Copies of the district court's judgment and the Ninth Circuit's opinion are reproduced in the Appendix to the Petition and are not

JURISDICTION

The court of appeals rendered its decision on January 7, 1994. Pet. App. A53. The City received Preferred's Petition in No. 93-1570 on April 5, 1994, and the Court's jurisdiction over this Cross-Petition is invoked pursuant to Rule 12.3. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). As set forth below, however, the City contends that Preferred lacks standing, and that therefore this Court and the courts below lack jurisdiction.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

1. Article III, Section 2 of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases . . . [and] Controversies. . . .

2. The First Amendment to the Constitution is reproduced at Pet. App. A165.

3. Section 3(8)(a) of the Los Angeles City Charter, and City of Los Angeles Ordinance No. 58,200 are reproduced *infra* at Cross-Pet. App. 7a-20a.

STATEMENT OF THE CASE

A. Introduction.

In its Petition for Writ of Certiorari, Preferred Communications, Inc. ("Preferred") asks the Court to review that aspect of the decision of the Ninth Circuit Court of Appeals permitting the City of Los Angeles to regulate the construction and operation of cable television systems through a Notice of Sale ("NOS") franchising process. The court of appeals further held that the City could not

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reproduced here. References to the Petition will be cited as "Pet." References to the Appendix to the Petition will be cited as "Pet. App." References to the Appendix to this Cross-Petition will be cited as "Cross-Pet. App."

limit to one the number of cable operators serving a given area as long as the City's utility infrastructure could physically accommodate a second system. Pet. App. A60-64. The court remanded the case, instructing the City to initiate its NOS process to solicit bids for a second cable franchise for South Central Los Angeles. *Id.* at A70-71.

If the Court decides to review any of the questions presented in the Petition, the Court should also review the following questions, which are inextricably linked to those in the Petition: (1) Whether a plaintiff with no financial or technical ability to construct a multi-million dollar cable system has standing to challenge a municipal cable franchising process based solely on the plaintiff's stated willingness to do so, an approach that conflicts with *Nor-West Cable Communications Partnership v. City of St. Paul*, 924 F.2d 741 (8th Cir.), *cert. denied*, —— U.S. ——, 111 S. Ct. 2853 (1991); (2) whether the First Amendment compels a municipality to allow installation of hundreds of miles of permanent cable plant on its property as long as there is sufficient space to do so, a holding that conflicts with the principle articulated in *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*), *petition for cert. filed*, 62 U.S.L.W. 3670 (U.S. Mar. 24, 1994) (No. 93-1523); and (3) whether the constitutionality of municipal restrictions on the grant of cable television franchises should be reviewed under the " 'forum-based' approach" articulated by this Court in *International Society for Krishna Consciousness v. Lee*, —— U.S. ——, 112 S. Ct. 2701, 2705 (1992), for "assessing restrictions the government seeks to place on the use of its property."

B. The Facts About Preferred.

Preferred was formed in July 1983, two months before the complaint in this action was filed. Cross-Pet. App. 2a. Its only principals are a self-employed accountant, his brother who is a medical doctor, and a retired postal worker. *Id.* Preferred has never issued any shares of stock, and there is no written agreement regarding its

stock ownership. *Id.* It has no books or records of account and no written corporate bylaws, resolutions, minutes of directors' meetings, annual reports, profit and loss statements, financial reports, financial statements, budgets, or prospectuses. *Id.* Its sole "assets" consist of a "loan" by two of Preferred's principals and a $15,000 "investment" by friends. *Id.* There are, however, no written agreements or documents evidencing the existence of either of these "assets." *Id.*

Neither Preferred nor its principals have ever constructed, owned, or operated a cable system. *Id.* Nor have they ever constructed, owned or operated any other type of business related to television. *Id.* Preferred has not entered into any contracts for the planning or construction of the cable system it says it wants to build, nor has it retained any marketing consultants or anyone else to conduct marketing surveys relating to such a system. *Id.* Moreover, Preferred has not prepared, commissioned, or sought any formal marketing, financial or demographic studies or analyses relating to the cable system it allegedly intends to construct, nor has it determined what the anticipated capital costs, operating costs, or revenues of its allegedly planned system would be. *Id.* at 3a.

Throughout this litigation, Preferred has never disputed its failure to take any tangible step to plan or finance the construction and operation of a multi-million dollar cable system, arguing instead that it has no intention of taking any preparatory steps until it is granted a franchise. CR 174 at Exh. 3, pp. 9-13; CR 172 at Exh. 14, pp. 168-69.[2]

C. The Nature of Cable Television.

A cable television system consists of a street-by-street, house-by-house, distribution system of cables and equipment installed on utility poles and in underground utility conduits, much like electric, telephone, water, and gas systems. CR 170 at ¶¶ 7-9. Contrary to the allegations

[2] References to "CR" refer to the Clerk's Record in the courts below.

in the Petition (at 3), the record below makes abundantly clear that the poles and underground utility conduits, as well as the property traversed by aerial cable wires, are located on, over or under public streets and rights-of-way that are held by the City in fee or through permanent easements. *E.g.*, CR 445 at ¶¶ 5-8; CR 450 at ¶¶ 11-12; CR 452 at ¶ 6.

The facilities of the fourteen cable systems currently operating in Los Angeles occupy approximately 6500 plant miles of City streets and rights-of-way. CR 452 at 12. The mileage of City streets and rights-of-way occupied by cable systems is comparable to that of the traditional public utilities, the only other users of City streets of this magnitude. *Id.*; CR 444 at ¶ 13. Nearly 700 miles of cable plant have already been installed over and under City streets and rights-of-way in South Central Los Angeles, where Preferred claims it seeks to build a cable system. CR 452 at ¶ 12.

The hypothetical cable system Preferred says it wants to build in South Central Los Angeles would require the installation of approximately 700 miles of additional cable plant over and under City streets and rights-of-way. CR 174 at Exh. 11; CR 200 at ¶ 7. Preferred's own expert estimated that construction of a cable system in South Central Los Angeles would require an investment of at least $26 million. CR 174 at Exh. 11.

D. The Utility Infrastructure of South Central Los Angeles.

A cable system in South Central Los Angeles would be installed primarily on utility poles. CR 282 at ¶¶ 17-22. The cable system would be located on, over or under public streets and rights-of-way held by the City in fee or through permanent easements. CR 445 at ¶ 6. These rights-of-way constitute public property. *Id.*

By replacing some existing poles with taller ones, and rearranging the wires and equipment of the City's Department of Water and Power ("DWP"), the telephone com-

pany, and the existing cable operator, it would be physically possible to accommodate a second cable system in South Central. CR 282 at ¶¶ 28, 37. However, the South Central utility infrastructure could, at most, accommodate only two, or a very small, unspecified number of cable systems. *Id.* at ¶ 35. Moreover, the installation of a second cable system in South Central would effectively exhaust the capacity of the existing poles, thereby foreclosing future expansion of essential public utility services in South Central, unless a substantial number of poles were replaced or rearranged at considerable cost. *Id.* at ¶¶ 35-37.

The installation of a second cable system would substantially increase the safety hazards that occur with the installation and maintenance of cable systems, and would also increase the safety risks faced by DWP employees working on electric power facilities on the utility poles. *Id.* at ¶¶ 4-16. A second system would also substantially increase disruption to street traffic and private property, as well as increase the permanent visual blight that necessarily accompanies utility poles and wires. CR 159 at ¶¶ 1, 9, 10.

E. Alternative Means of Distributing Video Programming.

Alternative technologies exist to deliver video programming to the home. CR 170 at ¶ 16. None involves construction of permanent facilities on public streets and rights-of-way, and thus none requires a franchise from the City. *Id.* With the possible exception of broadcast television stations, each requires less capital investment than a cable system. *Id.* at ¶ 23.

F. The City's Franchising Process.

The Los Angeles City Charter provides that the City "may grant franchises for fixed terms . . . for the construction and operation of plants or works necessary or convenient for furnishing the City and its inhabitants with

transportation, communication, terminal facilities, water, light, heat, power, refrigeration, storage, or any other public utility or service." Cross-Pet. App. 7a. City Ordinance No. 58,200, enacted in 1927, long before the advent of cable television, establishes the method by which the City grants franchises. *Id.* at 8a. It requires any business seeking to "construct, maintain or operate" certain types of facilities "upon, over, in, under, across any street, lane, alley, court, highway, road or other place" to obtain a franchise. *Id.* at 8a, § 2.

Ordinance No. 58,200 has been applied to a wide range of activities that make non-transient use of City streets and rights-of-way, including street railroads, water, gas, and electric companies, pipeline companies, taxicab companies, and non-cable communications line companies, such as private data transmission lines. CR 444 at ¶¶ 11-13. By its terms, the ordinance also applies to cable television systems, since it it requires a franchise to construct or operate on "poles . . . conduits, wires or cable" on, over or under City streets or rights-of-way "for communication" or for "furnishing the city and its inhabitants with . . . communication. . . ." Cross-Pet. App. 9a at §§ 2(4), (5).

Regardless of the nature of the prospective franchisee's business, the procedure that the City follows in granting franchises is essentially the same. Ordinance No. 58,200 requires that any franchise be granted only through a Notice of Sale process, referred to as an "NOS." CR 444 at ¶ 39; Cross-Pet. App. 9a-12a. The appropriate City Department prepares the NOS, which includes minimum requirements and a draft franchise with proposed terms and conditions. CR 444 at ¶ 39. The appropriate Board of Commissioners, which consists of members of the public appointed by the Mayor and confirmed by the City Council, then considers the proposed NOS in public sessions at which the general public, including franchise applicants, may participate. *Id.* at ¶¶ 38-41. The Board then forwards its recommendation to the City Council,

where the matter is reviewed in public session by the Council Committee with jurisdiction. *Id.* at ¶¶ 38-41. The Committee reviews the Board's recommendation and forwards the matter to the full City Council, which also holds a public hearing. If the City Council approves, the NOS is published. *Id.* at ¶ 39.

Bids received in response to the NOS are first reviewed by the staff of the appropriate City Department, which prepares a report evaluating applications. *Id.* The staff report is forwarded to the Board of Commissioners, which then holds more public hearings, at which the Board makes a recommendation as to the highest responsible bidder. The Board then forwards the matter once again to the appropriate Council Committee for review and recommendation, which is also done in public session. The matter is then reported to the full City Council. *Id.* The Council holds a public hearing and votes on whether to grant the franchise. If it votes to do so, its decision is forwarded to the Mayor, who can approve or veto the Council's decision. *Id.*

In the mid-1970s the City developed a comprehensive master plan for cable franchising. CR 175 at ¶ 6. Using the NOS process described above, and relying on recommendations in the master plan, the City ultimately granted fourteen cable franchises, including one for South Central Los Angeles. CR 114 at Exh. A, at 5-6.

The City's cable franchising process has been governed by, and is in all respects consistent with, relevant federal and state law. It is similar in all material respects to the process by which most municipalities and counties across the nation have granted cable franchises. CR 175 at ¶¶ 13-14.

REASONS FOR GRANTING THE CROSS-PETITION

I. THE QUESTIONS PRESENTED HERE ARE INTERTWINED WITH THOSE IN PREFERRED'S PETITION, AND THE COURT COULD NOT FAIRLY OR ADEQUATELY RESOLVE THEM SEPARATELY.

As a threshold matter, of course, the Court is "obliged to examine [Preferred's] standing," even if the issue "is raised by neither of the parties." *Juidice v. Vail*, 430 U.S. 327, 331 (1977). Thus, if the Court is otherwise inclined to grant the Petition, it would be obligated to consider whether Preferred has standing. That obligation takes on greater significance here, since the Ninth Circuit's ruling on standing appears to conflict with the Eighth Circuit's decision in *Nor-West*, 924 F.2d 741.

Preferred asks the Court to review the portion of the court of appeals' decision upholding the NOS process used by the City to award cable television franchises. Pet. at 17 & 30. That question, however, cannot be meaningfully considered without first addressing the predicate issue resolved by the Ninth Circuit and raised by the City in this Cross-Petition: Whether the First Amendment compels the City to cede use of its streets and rights-of-way to more than one cable operator, simply because there is space available physically to accommodate an additional system, notwithstanding the City's interests in minimizing safety risks, disruption, and visual blight caused by an additional system, and in conserving the space for other uses.

Accordingly, if the Court is inclined to grant Preferred's Petition, it should grant the City's Cross-Petition as well.

II. THE QUESTIONS PRESENTED RAISE IMPORTANT QUESTIONS OF FEDERAL LAW THAT THE NINTH CIRCUIT RESOLVED IN A MANNER THAT CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Ninth Circuit's Holding That Preferred Has Standing Conflicts With A Decision Of The Eighth Circuit.

The district court and Ninth Circuit both concluded as a matter of law that Preferred has standing to pursue its claims for relief. *See* Cross-Pet. App. 5a; Pet. App. A57-58. However, in the context of granting the City's summary judgment motion on damages, the district court made findings of fact based on undisputed evidence establishing that Preferred is a paper corporation without any tangible assets or capabilities. Cross-Pet. App. 2a-3a. Specifically, the district court found that Preferred has no employees, no offices or equipment, no corporate books or records, and no documented assets. Moreover, its principals have no experience in the cable business, and the company has not entered into any contracts with anyone else who has such experience. *Id.* In short, the record reveals no evidence from which a rational fact-finder could infer that Preferred has the financial or technical ability to construct or operate a cable system.

The court of appeals did not disturb those findings. Relying instead on evidence of the self-proclaimed willingness of Preferred's principals to build a cable system, the court of appeals concluded that "[n]othing in the record here suggests that Preferred doesn't intend to build a South Central cable system if it's awarded the franchise." Pet. App. A58. Reasoning that invalidation of the so-called "one area/one operator" requirement would remove an obstacle to Preferred's receiving a franchise, the court of appeals held that Preferred had standing to pursue its claims. *Id.*

The Ninth Circuit's holding is in conflict with the Eighth Circuit's decision in *Nor-West*, 924 F.2d 741. In *Nor-West*, as in this case, a would-be cable operator challenged a municipality's failure to award a second, competitive cable franchise.[3] The Eighth Circuit held that a plaintiff lacks standing to challenge a municipal cable franchising process unless the plaintiff is both willing and financially able to build a cable system. Absent these attributes, a plaintiff simply is not "likely to benefit" from the grant of a second cable franchise. *Id.* at 749. In *Nor-West*, a jury had determined after a trial on the merits that the plaintiff—a company whose principals had far more substantial net worths than the principals of Preferred—was neither willing nor financially able to construct a cable system. *Id.* at 747-48. The Eighth Circuit held that the plaintiff therefore lacked standing to pursue its claims. *Id.* at 748-49.

The court of appeals attempted to distinguish *Nor-West* on the grounds that the jury there had found that the plaintiff was both financially unable and unwilling to compete for a second cable franchise. By contrast, the Ninth Circuit reasoned that there was evidence that Preferred was willing to compete for a franchise. Pet. App. A57-58.

The Ninth Circuit's distinction, however, is illusory. In *both* cases, the plaintiffs failed to demonstrate a financial ability to build or operate a cable system. The reasoning of *Nor-West* compels the conclusion that lack of financial ability alone is a sufficient reason to deny standing, because absent such ability, the plaintiff would not

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[3] The similarities between this case and *Nor-West* are no accident. The plaintiff in *Nor-West* was represented by the same counsel that represents Preferred here, *see* 924 F.2d at 743, and indeed, the original complaints in both suits were filed within days of each other. *Compare* 924 F.2d at 744 (*Nor-West* filed on September 2, 1983) *with* CR 1 (original complaint filed in *Preferred* on September 9, 1983).

have a "realistic chance" of benefitting from a decision to grant it a cable franchise. *Nor-West*, 924 F.2d at 749. By contrast, the Ninth Circuit's reasoning in this case removes financial ability from the calculus entirely, holding that a plaintiff's mere subjective intent is sufficient to confer standing, even in the complete absence of any objective evidence that the plaintiff has any ability whatsoever to construct and operate what it concedes to be a multi-million dollar cable system.

Thus, under the Ninth Circuit's approach, *anyone* would have standing to challenge a municipal cable franchising process simply by expressing a subjective "desire" or "willingness" to build or operate a cable system. This reasoning is not only at odds with *Nor-West*, but also with the principles articulated in *Lujan v. Defenders of Wildlife*, —— U.S. ——, 112 S. Ct. 2130 (1992). *Lujan* holds that the "irreducible constitutional minimum of standing" comprises three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' ". . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.". . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 2136 (citations omitted). Absent evidence from which a rational fact-finder could conclude that Preferred has a realistic chance of successfully financing, constructing and operating a multi-million dollar cable system, it is inherently "conjectural" and "speculative," as opposed to "likely," that Preferred's claimed injury—its inability to engage in the First Amendment activities of a cable operator—will be redressed by a favorable decision.

If allowed to stand, the Ninth Circuit's reasoning essentially gives the world at large standing to challenge a city's franchising process. After all, the "obstacle" whose removal the court of appeals viewed as significant—the City's "one area/one operator" policy—is no more an obstacle to Preferred than it is to anyone else's hypothetical ability to operate a cable system in South Central Los Angeles. Yet surely everyone does not have standing to challenge the City's franchising requirements simply because they express a subjective "willingness" to build and operate a cable system.

What the Ninth Circuit overlooked, and what the *Nor-West* court properly recognized, is that for a plaintiff to have standing to challenge a municipal cable franchising process, there must be sufficient evidence from which a rational fact-finder could infer that the plaintiff would have a "realistic chance" of doing what it claims the franchising process has prevented it from doing: Engaging in those aspects of cable television operation and programming that implicate the First Amendment. *See Nor-West*, 924 F.2d at 749 (quoting *Doherty v. Rutgers School of Law-Newark*, 651 F.2d 893, 902 (3d Cir. 1981)). To engage in those activities, however, a plaintiff needs much more than a franchise: It needs to be able successfully to build and operate a cable television system. Here, Preferred's own expert conceded that building and operating a cable system in South Central Los Angeles would require at least $26 million. CR 174 at Exh. 11; CR 200 at ¶ 7.

Because of the substantial financial resources and experience required to build and operate a cable system, the question of standing in cable television cases necessarily presents far different issues than the question of standing in cases involving most other, far less capital-intensive types of First Amendment activities. The simple economic fact of life is that not everyone has the resources or experience to engage in those aspects of cable system

operation that implicate the First Amendment. Thus, for the vast majority of the public, the inability to engage in such activities has nothing to do with municipal franchising, and cannot be redressed by any court.

If constitutional challenges to cable franchising are to be resolved in concrete controversies, as opposed to purely academic, speculative exercises on the First Amendment implications of cable franchising, then the plaintiff must possess some objective attributes from which a rational fact-finder might infer that it could successfully build and operate a cable system. Under the court of appeals' reasoning, however, it appears that standing must be conferred on "any stranger who might arrive in [Los Angeles] with the desire or wish to enter the [cable business] and who claimed that because of [the City's franchising process] he was prevented from doing so." *Duff v. Kansas City Star Co.*, 299 F.2d 320, 323 (8th Cir. 1962). Such a sweeping construction of the concept of standing is an open invitation to advisory opinions, and merits the review of this Court.

B. The Ninth Circuit Erred In Construing The First Amendment To Compel The City To Allow Installation Of Permanent Structures On Public Streets And Rights-Of-Way, In Apparent Conflict With A Decision Of The Seventh Circuit.

The Ninth Circuit held that, because the City conceded that it would be physically possible to install a second cable system on the City's existing utility infrastructure in South Central Los Angeles, the First Amendment prohibited the City from refusing to allow a qualified applicant to do so. In other words, the Ninth Circuit held that the First Amendment requires the City to permit a would-be franchisee to occupy hundreds of miles of City-owned streets and rights-of-way with permanent cable plant, even if the City wishes to conserve the space for other future uses, and despite the City's concerns about the increased safety risks, disruption, and visual blight caused by an additional system.

In this lawsuit Preferred argues that it has a constitutional right to construct 700 miles of cable plant using City utility poles, underground conduit, rights-of-way and easements. CR 174 at Exh. 11; CR 170 at ¶¶ 7-9; CR 445 at ¶ 6. Stated differently, Preferred claims that the First Amendment gives it the right to a "permanent physical occupation" of City property, the equivalent of a Fifth Amendment taking of that property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 428-29, 438 (1982); *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 99 (1893) (installing poles and wires will dispossess public "as if it had destroyed that amount of ground").

By holding that the City must permit the installation of at least one more cable system on City-owned property, the court of appeals' decision clearly conflicts with the principle articulated by the Seventh Circuit in *Graff v. City of Chicago*, 9 F.3d 1309. The Seventh Circuit held in *Graff* that "no person has a constitutional right to erect or maintain a structure on a public way." *Id.* at 1314. That case involved a First Amendment challenge to municipal regulations restricting the ability to build and operate a newsstand on public property. The Seventh Circuit held that the building and operation of a newsstand was "conduct, not speech, which the City can lawfully proscribe." *Id.* at 1315.

The Seventh Circuit contrasted newsstands with much less intrusive newsracks, which were the subject of this Court's decision in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988). The *Graff* court wrote:

> Newsstands are large, permanent-type structures. They are constructed, and once in place they are not easily moved. Newsstands do not present one viewpoint; rather they supply many and varying editorial opinions. . . . Newsstands also are more likely to obstruct the views of pedestrians and automobile drivers. In short, newsstands compared to newsracks

> are much larger, more permanent structures that occupy a significant portion of limited sidewalk space.

Graff, 9 F.3d at 1315 (footnotes omitted).

If a municipality may constitutionally prohibit the construction and operation of a single newsstand on a City sidewalk, then surely it may constitutionally prohibit the construction and installation of 700 miles of cable plant over and under its rights-of-way and streets. Using the language of the Seventh Circuit, cable television systems are "large, permanent-type structures. They are constructed, and once in place they are not easily moved." Cable television systems "do not present one viewpoint; rather they supply many and varying editorial opinions." Cable television systems are more likely than newsstands "to obstruct the views of pedestrians and automobile drivers," as well as homeowners. In short, compared to the newsstands at issue in *Graff*, cable television systems "are much larger, more permanent structures that occupy a significant portion of limited [City right-of-way and easements]." *Id.*

The Ninth Circuit mandated that the City permit a qualified bidder to construct and operate a second cable system on City-owned property. This holding conflicts with the holding in *Graff* that a municipality is not required to permit the construction and operation of a less intrusive structure, a newsstand, on municipally-owned property. Moreover, the Ninth Circuit's holding essentially sanctions a Fifth Amendment "taking" of public property by a private party. Such a sweeping interpretation of the First Amendment merits this Court's attention and review.

C. The Ninth Circuit Failed To Apply Forum Analysis, Which This Court Has Held Is The Proper Approach For Assessing Restrictions That The Government Places On Use Of Its Property.

As already noted, what Preferred seeks is the right to install hundreds of miles of cable plant on City property —specifically, the City's utility infrastructure, streets and rights-of-way. In *International Society for Krishna Consciousness v. Lee*, —— U.S. ——, 112 S. Ct. 2701, 2705 (1992), this Court made clear that "a 'forum-based' approach" is the proper analytical framework "for assessing restrictions that the government seeks to place on the use of its property." The Ninth Circuit, however, did not follow this Court's "forum-based" approach. Had the court of appeals done so, it would have been compelled to uphold the City's right to limit to one the number of cable operators serving a given area of the City.

If, as this Court held in *Krishna Consciousness*, the interior areas of a publicly owned airport are a nonpublic forum, then surely the City's utility infrastructure (to which Preferred claims a First Amendment right of access) is likewise a nonpublic forum. The City has consistently and sharply restricted access to its utility infrastructure, as well as to any non-transient use of its streets and rights-of-way, through the very NOS process that Preferred challenges in its Petition here. Moreover, there can be no question that, even more than the airport terminal in *Krishna Consciousness*, the City's utility infrastructure is physically separated from acknowledged public areas and thus "a special enclave, subject to greater restriction." *Id.* at 2706.

Because the City's utility infrastructure is a nonpublic forum, the City's right to restrict access to its utility infrastructure must be upheld as long as it is reasonable and "not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Id.* at 2705-06. Moreover, to be reasonable, restrictions on speech activi-

ties in a nonpublic forum need not be the "most reasonable" or the "only reasonable" restrictions. *Id.*

The City's policy of controlling access to the utility infrastructure easily satisfies this standard. It furthers the City's legitimate interests in preventing the exhaustion of the existing capacity of the South Central utility infrastructure, and minimizing safety hazards, disruption to streets and property, and visual blight. CR 282 at ¶¶ 4-16 & 35-37; CR 159, at ¶¶ 1, 9, 10. The Ninth Circuit recognized the legitimacy of these governmental interests, and it did not dispute that the City's policy furthered these interests. The court nevertheless found that the City's policy was not sufficiently narrowly tailored to advance those intertests. Pet. App. A60-64. The result, however, would have been different under forum analysis. This Court has previously held that these interests are reasonable, and are sufficient to justify restriction of speech in a nonpublic forum. *See U.S. v. Kokinda*, 497 U.S. 720, 729 (1990); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984).

Nor is there anything in the record to suggest that the City's policy is an attempt to suppress any speaker's activity because of the speaker's point of view. *Krishna Consciousness*, 112 S. Ct. at 2705-06. To the contrary, the policy has its genesis in Ordinance No. 58,200, which established the City's franchising process in 1927, long before the advent of cable television. Moreover, the record makes clear that the City's franchising process is not limited to cable television, but instead has historically been applied to all comparable non-transient uses of City streets and rights-of-way, including street railroads, public utilities and taxicab companies. The process requires input from the public at duly noticed public meetings at every stage (CR 444 at ¶¶ 38-41), and action by the five citizen members of the Board of Telecommunications Commissioners, the fifteen members of the City Council, and the Mayor, thus insulating against the possibility that

any government official could manipulate the process to discriminate against an applicant based on the applicant's views.

Because the Ninth Circuit's failure to apply forum analysis represents a substantial departure from the decisions of this Court in a matter of substantial importance to municipalities' ongoing ability to manage and control the use of public property, this Court's review is warranted.

CONCLUSION

If this Court grants Preferred's Petition for a Writ of Certiorari, it should likewise grant this Conditional Cross-Petition.

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